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No. 86-147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HOME WARRANTY CORPORATION, *et al.*,
Petitioners,

v.

JOHNNIE L. CALDWELL,
INSURANCE COMMISSIONER OF THE STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, in the first federal appellate decision interpreting the Product Liability Risk Retention Act of 1981, 15 U.S.C. 3901, *et seq.*, the Court of Appeals misinterpreted this congressional response to the liability insurance crisis by imposing additional requirements for qualification as a risk retention group not mandated by the statute, authorized by Congress, or supported by legislative history.

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Petitioners, Home Warranty Corporation ("HWC"), Home Owners Warranty Corporation ("HOW"), and HOW Insurance Company ("HOWIC"), petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Eleventh Circuit entered December 11, 1985.[1]

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 777 F.2d 1455 (11th Cir. 1985). A copy of the court's opinion

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[1] Petitioner HWC is a non-stock membership corporation of home builders, is incorporated in the state of Delaware and is the parent company of wholly owned subsidiaries, and co-Petitioners, HOW (a District of Columbia corporation) and HOWIC (a Delaware corporation).

is reprinted in the Appendix (App.) at p. 1a. The District Court's Order is reprinted at App., p. 73a.

JURISDICTION

The Order of the Court of Appeals was entered on December 11, 1985. App. at p. 1a. A timely Petition for Rehearing was denied on June 16, 1986. App. at p. 71a. The jurisdiction of this Court is envoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

This case solely involves interpretation and application of a federal statute, the Product Liability Risk Retention Act. Pub. L. 97-45, 15 U.S.C. Sec. 3901-04, *as amended* (the "Act" or the "Risk Retention Act"). *See* App. at 102a.

STATEMENT OF THE CASE

The instant case arose over the issue of whether HOWIC qualifies as a risk retention group under the Risk Retention Act, thereby entitling it to exemption from certain state laws and regulations which would deleteriously affect HOWIC's interstate operation as such a group.

A. The Risk Retention Act, A Congressional Response to the Product Liability Crisis.

The Risk Retention Act was passed by Congress in 1981 as a response to the increasing difficulty product manufacturers were experiencing securing liability insurance. The Act was designed to allow manufacturers of products, including homes, to form entities called risk retention groups to self-insure all or any part of their product liability risk. By forming a risk retention group, members could spread all or a part of their product liability risk among the membership.

Congress recently had occasion to recount the purpose of and history leading up to passage of the Risk Retention Act:

In 1981, Congress enacted the Product Liability Risk Retention Act of 1981, which was reported by the Committee as S. 1096. This bill was enacted to facilitate the ability of businesses to purchase product liability insurance on a group basis and to establish self-insurance coverage on a group basis for product liability risks. It does this by preempting certain duplicative and overlapping State laws, which have restricted the formation of such groups.

Risk retention legislation first had been considered by the Committee as a response to the high cost and unavailability of product liability insurance in the late 1970's. In its report on the 1981 legislation, the Committee recognized that the product liability insurance market had stabilized and that availability was no longer a problem; however, the Committee noted that product manufacturers and distributors, small and large, continued to believe that product liability insurance costs were too high and that the insurance industry was not being responsive to the actual claims experience of product manufacturers and distributors.

The 1981 Committee report noted that product liability insurance rates are generally developed through the exercise of underwriting judgments that are not set solely by actuarial techniques and that the ratemaking process has been complicated by judicial decisions, beginning in the 1960's and continuing throughout the 1970's, which had increased the potential liability of product manufacturers and sellers. The Committee recognized that in such circumstances many insurance companies were unable to project future claims experience and were using subjective ratemaking techniques, which resulted in both a refusal to provide coverage and extremely high costs for such coverage. The Risk Retention Act was adopted by the Committee as a response to this ratemaking problem that would increase competition in the product liability sector of the insurance industry.

> The Risk Retention Act was thus adopted by the Committee to help assure that insurance rates and premiums are set on a competitive basis. That Act accomplished this by preempting State law to the extent necessary to facilitate the establishment of collective purchasing groups and interstate self-insurance groups for product liability and completed operations liability coverage.

Senate Report No. 99-294 (1986) at pp. 2-3 (footnotes omitted).

The Act sets out five requirements for a group to be a risk retention group. The corporation (or limited liability association taxable as a corporation) must:

> (1) have as its primary activity the "assum[p-tion] and spreading [of] all, or any portion, of the product liability . . . risk exposure of its group members";
>
> (2) have been "organized for the primary purpose of [assuming and spreading all, or any portion, of the product liability risk exposure of its group members]";
>
> (3) be "chartered or licensed as an insurance company and authorized to engage in the business of insurance under the laws of any State, or . . . so chartered or licensed . . . before January 1, 1985, under the laws of Bermuda or the Cayman Islands . . .";
>
> (4) "not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person"; and
>
> (5) be composed of members each of whose principal activity consists of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product or products."

15 U.S.C. Sec. 3901(a)(4).

The Act defines "product liability" as:

> [L]iability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of the use of property) arising out of the manufacture, design, importation, packaging, labeling, lease or sale of a product[.]

15 U.S.C. Sec. 3901(a)(3). *See* discussion, *infra.*

B. The HOW Program And Formation Of HOWIC.

When home builders were no longer able to obtain warranty and construction defect insurance from commercial insurance companies, it became necessary to form the risk retention group known as HOW Insurance Company ("HOWIC") to self-insure this portion of their product liability risk. As noted, HOWIC is the wholly owned subsidiary of Petitioner HWC, a membership corporation composed exclusively of home builders who enroll all homes they build into a ten-year insurance protection program known as the HOW Program. This program, is largely administered by HWC's other wholly owned subsidiary, Home Owners Warranty Corporation ("HOW").

Briefly described, the coverage of the HOW Program involves two main components: *First*, in the first two years of protection, the builder warrants that: (a) the home will be free from defects due to failure of the builder to comply with certain delineated building standards (first year only); (b) the plumbing, electrical, heating, cooling and ventilation systems (exclusive of fixtures, appliances and items of equipment of the home) will be free of defects (years one and two); and (c) the home will be free of "major structural defects" (years one and two).[2] Should such defects develop during the builder's

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[2] As defined by the warranty/insurance documents, a "major structural defect" is:

> Actual physical damage to [certain] designated load-bearing portions of the home . . . which affects their load-bearing func-

warranty period, the builder is responsible to the homeowner for repairing or replacing, or paying the reasonable costs of repairing or replacing, such defects. In the event the builder defaults on his obligation during years one and two, HOWIC steps in and meets the builder's written warranty obligations. Should this occur, HOWIC then has the right to seek indemnity from the builder for any first and second year claim that HOWIC paid. *Second*, during the next eight years (years three through ten) of the HOW Program, unlike the first two years, the builder extends no written warranties. Rather, HOWIC insures that during that eight-year period the home will be free from major structural defects. In the event such a defect arises during that period, HOWIC pays the claim on behalf of the builder. Moreover, should the homeowner sue the builder/member for such a defect, HOWIC defends the builder and indemnifies the builder for the cost of repairing such defect.

The premium for this insurance, both warranty insurance and major structural defect insurance, is paid by the builder, not the homeowner. The homeowner receives a certificate evidencing the fact that the builder has purchased this insurance and that the homeowner's home is among those on which the builder has obtained insurance.

C. Litigation Concerning HOWIC's Status As A Risk Retention Group.

Prior to the decision of the United States District Court for the Northern District of Georgia in the instant case, the issue of whether HOWIC qualified as a risk retention group had been decided by the United States District Court for the District of Delaware. In that case, the Delaware Insurance Commissioner issued a Show Cause Order alleging that HOWIC violated Delaware law in that it allegedly misrepresented the company's insur-

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tions to the extent that the home becomes unsafe, unsanitary or otherwise unlivable.

ance by using Delaware's approval of its filings in Delaware as a basis for operating the HOW Program in other states under the Risk Retention Act. Petitioners filed a complaint seeking preliminary and permanent injunctive relief as well as an order declaring HOWIC a risk retention group under the Act. In two decisions, the District Court for the District of Delaware, analyzing the HOW Program, concluded that HOWIC met all criteria of the Risk Retention Act and therefore qualified as a risk retention group. *Home Warranty Corporation v. Elliott*, 585 F. Supp. 443 (D.Del. 1984) ("Elliott II"); *Home Warranty Corporation v. Elliott*, 572 F. Supp. 1059 (D.Del. 1983) ("Elliott I"). *See* App. at pp. 75a and 83a.[3]

During the pendency of the Delaware litigation, the Insurance Commissioner of Georgia, relying on the action taken by the Delaware Insurance Commissioner, issued an Order requiring HOWIC to cease and desist operating as an insurance company in Georgia under the Risk Retention Act until it had obtained a certificate of authority from the Georgia Insurance Commissioner to operate as a foreign insurer in that state. Petitioners thereupon filed a complaint in the United States District Court for the Northern District of Georgia seeking an injunction against the Georgia Insurance Commissioner and an order declaring that HOWIC was a risk retention group under the Act and therefore exempt from the requirement that it obtain a certificate of authority to operate in Georgia.[4] On July 23, 1984, the Georgia District Court (Hall, J.), having the benefit of the Delaware decisions,[5] entered an Order granting Petitioners' Summary Judgment motion,

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[3] Neither *Elliott* decision was appealed.

[4] The Georgia District Court properly had jurisdiction of the case pursuant to 28 U.S.C. Sec. 1331.

[5] The Georgia District Court stayed action pending the decision of the Delaware District Court on whether HOWIC was a risk retention group.

declared HOWIC to be a risk retention group and enjoined the Georgia Insurance Commissioner from interfering with HOWIC's activities in any manner except as permitted by the Act. App. at p. 73a.

On appeal, a panel of the Eleventh Circuit, on December 11, 1985, vacated the Order of the District Court for the Northern District of Georgia and remanded the case for further proceedings on the following two issues: (1) whether product liability risks of HWC members are retained and spread; and (2) whether the retention and spreading of products liability risk was the primary purpose of the group. *See* Slip Op. at 1119, App. at pp. 67a-70a. In doing so, the Court of Appeals instructed that certain criteria should be examined, which criteria, Petitioners maintain, are not part of the Act nor within congressional intent.

The panel devoted most of its forty page opinion to a discussion of the evolution of product liability law and insurance in the United States, the legislative history of the Act and the development of the HOW Warranty Program. Following that discussion, the panel concluded:

1. HOWIC undertakes to provide insurance applicable only to risk of, damage to or loss of the product itself (*i.e.*, the house). Slip Op. at p. 1117, App. at pp. 65a-66a.

2. Damage to the product itself (*i.e.*, a house), is within the purview of the Act's definition of "product liability" and accordingly, the subject matter of HOWIC's insurance "fall[s] within the scope of the Risk Retention Act." Slip. Op. at p. 1117, 1118, App. at pp. 66a, 67a.

3. The coverage provided during the first two years of the HOW Program does not constitute assumption and spreading of product liability risk exposure of member builders because HOW reserves the right to seek reimbursement from the builders for amounts paid for the benefit of the home-

owner during that two-year term. Slip Op. at p. 1118, App. at pp. 67a-68a; and

4. There were insufficient facts on record to establish whether the coverage in years three through ten of the program is such that the entire program satisfies the requirement that the "primary activity" of the group is the assumption and spreading the products liability exposure of the member builders. Slip Op. at 1118, 1119, App. at pp. 68a-69a.

Petitioners filed a timely motion for rehearing en banc, which motion was denied by the Eleventh Circuit on June 16, 1986. App. at p. 71a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. SPECIFICALLY, THE DECISION OF THE COURT OF APPEALS MISCONSTRUES THE INTENT OF CONGRESS AND ENGRAFTS QUALIFYING CRITERIA ONTO THE PRODUCT LIABILITY RISK RETENTION ACT WHICH ARE NEITHER REQUIRED BY THE STATUTE NOR SUPPORTED BY ITS LEGISLATIVE HISTORY.

There have been four federal court decisions interpreting the Risk Retention Act, namely the two decisions rendered by the United States District Court for the District of Delaware in *Elliott I* and *Elliott II*, *supra*, the decision of the United States District Court for the Northern District of Georgia and the Eleventh Circuit decision from which Petitioners have respectfully filed this Petition. The district court in each instance found that HOWIC qualified as a risk retention group. The Eleventh Circuit decision in the instant case is the only decision not reaching that conclusion. This Court has never had occasion to review, interpret, or apply the Product Liability Risk Retention Act, which represents the first remedial legisla-

tion passed by Congress in response to the liability insurance crisis. Petitioners submit that the decision of the Eleventh Circuit misinterprets Congress' intent in passing the Risk Retention Act, and raises an important question of federal law which should be settled by this Court on Writ of Certiorari. *See* Rule 17, Supreme Court Rules.

The error committed by the Court of Appeals may be explained as follows. The Court of Appeals reversed the decision of the district court and remanded the case for the trial court to consider: (1) whether in years three through ten of the HOW Program, "product liability risk" is retained and spread by the group rather than placed solely upon the builder/manufacturer of the home in question; and (2) whether this retention and spreading is the "primary activity" of HOWIC when the program is considered as a whole. While, ostensibly, these criteria seem to track the requirements of the Act, *see* 15 U.S.C. Sec. 3901(a)(4), App. at 103a-104a, in explaining its remand instructions, the Court of Appeals engrafted additional qualifying criteria onto the Act which are inconsistent with clearly articulated congressional intent.

Specifically, the Court of Appeals stated:

> The remainder of the HOW coverage, years three through ten of the Program must therefore constitute the insuring of products liability risks such that the entire program satisfies the primary activity requirement. Among the factors the trial court should consider relevant in this calculation are: (1) *what portions are product liability risks of the builder as defined by Congress in the Risk Retention Act and what portions are risks created by and in the policy*; and (2) *what portion of the protection afforded by the Program is merely an alternate source from which the homeowner can satisfy certain claims respecting damage to his home.*

Slip Op. at 1118, App. at 68a (Emphasis added).

The Court of Appeals also mandated that:

> Any right to recovery in the homeowner must imply a liability on the part of another . . . *If that right arises from products liability imposed upon a member builder, such would be significant. If it is merely a right created by contract and not otherwise existing as a product liability of the builder, the insurance entity could not be found to be assuming or spreading the products liability of its members.* . . . To determine the homeowners' right of recovery, one would look to the policy, not to any jurisdiction's products liability law. To determine its obligation HOW would look to the policy, not to any liability imposed on the builder by law. There may be an overlapping of the rights of the homeowner and rights provided by the policy. If they overlap, to what extent does HOW assume and spread products liability exposure (imposed by law) of its members? To qualify as a risk retention group this must be its primary purpose.

Slip Op. at p. 1119, App. at pp. 69a-70a (Emphasis added).

Taking these two passages together, it is evident that in the Eleventh Circuit's opinion, before HOWIC, or any other group, may qualify as a risk retention group under the Act, it must be determined that: (1) the protection accorded is not merely an "alternate source" of compensation to the injured party; and (2) the liability of the insured, or, alternatively, the injured party's right of recovery, arises from tort law rather than from contract, or from a combination thereof. These two qualifying criteria can not be found in the Act itself or in the legislative history of the Act. The sole criteria established with respect to the nature of the risk is whether such risk is a "product liability risk" as defined by the Risk Retention Act, 15 U.S.C. Sec. 3901(a)(3). A review of the legislative history of the Act makes it abundantly clear that the sort of risk which HOWIC insures was intended by Con-

gress to come within the Act's definition of "product liability risk."

In order to facilitate the formation and interstate operation of risk retention groups, the Act adopts a federal definition of "product liability" to be used in determining whether a group qualifies as a risk retention group. *See* 15 U.S.C. Sec. 3901(a)(3), *supra*. This definition which is "broader than the existing product liability law of many jurisdictions," H.R. Rep. No. 97-190 97th Cong., 1st Sess. 9 (1981), lists a broad range of damages which are product liability damages under the Risk Retention Act, but not necessarily product liability damages under some state laws. For example, the definition includes liability for "property damage . . . arising out of the manufacture, design . . . or a sale of a product. . . ." 15 U.S.C. Sec. 3901(a)(3). Additionally, because some jurisdictions allow recovery on a product liability claim for property damage to the product itself, the Act recognizes such damages as product liability. *Id.*

The legislative history of the Act states the rationale for this broad definition of product liability. Congress intended to:

> allow product sellers to protect themselves through risk retention groups against these types of damages in jurisdictions where recoveries for such damages are permitted or where the applicable law may change in the future. The definition is permissive and concerns permissible coverage.

H.R. Rep. No. 97-190 at 10.

This rationale follows from the purpose of the Act, which is to allow a risk retention group to form and operate nationally after satisfying the licensing requirements of one state. *Id.* at 12. The fact that states differ on the definition of product liability is irrelevant in determining the extent to which the group can insure against potential liability for product defects. If the group's attempt to assume and spread the product liability risk

exposure was limited by the product liability law of each jurisdiction, the purpose of the Act would be frustrated because the interstate operation of the group would be hindered. The Act permits the group to insure against potential product liability damages of any type which may arise anywhere. In this way, risk retention groups will not be subject to conflicting requirements or laws of the states in which they operate. H.R. Rep. 97-190 at 12-13.

When Congress amended the Risk Retention Act in 1983 to reemphasize that the Act's definition of product liability was very broad, the Senate Commerce Committee took the occasion to address the situation of home builders:

> The Act authorizes risk retention and purchasing groups to insure against "product liability" risks. It defines "product liability" for the purpose of delineating the scope of coverage that groups may provide, in order to facilitate their interstate operation and ensure that companies in differing States can join together to establish self-insurance arrangements. . . .
>
> Congress clearly recognized that the definition of "product liability" in the Risk Retention Act was broader than the existing law of many jurisdictions, and that the laws of many States do not allow recovery for consequential economic losses in tort cases or for emotional harm unaccompanied by physical harm. Nonetheless, the Act included "damages for loss of use of property—an example of consequential economic losses—in the term 'product liability,' " and defined "product liability" to "permit insurance coverage for emotional damages even though an individual does not suffer any physical consequences." . . .
>
> The Committee recognizes that the definition of "product liability" may be broader than the existing product liability laws of many jurisdictions in several respects. . . .
>
> * * * *

> In sum, the bill is intended to offer insurance opportunities to home builders and other manufacturers and product sellers, but not to affect [sic] their tort liability which remains subject to State law.

Senate Report No. 98-172, 98th Cong., 1st Sess. at pp. 2-3 (Citation, emphasis and footnote omitted).

Moreover, Senator Robert Kasten, sponsor of the 1981 Product Liability Risk Retention Act and the 1983 amendment thereto (S. 1046) stated, in offering S. 1046 for consideration, the following:

> S. 1046 makes clear, as was originally intended, that risk retention and purchasing groups may insure coverage which constitutes a "product liability" loss, as that term is defined by the Risk Retention Act. This includes insurance by a risk retention group for damage to a product itself (*such as builder warranties*), as well as injury to persons and other property. . . .
>
> *The bill is intended to offer insurance opportunities to home builders*[.]

129 Cong. Rec. S. 4566-67 (daily ed. April 13, 1983) (quoting in part from the Committee Report) (Emphasis added).

Thus, the very fact that Congress considered the risk at stake here (*i.e.*, damage to or loss of the home itself) to be a "product liability risk" means that Congress found that risk to be a product liability risk under some state's tort law thereby satisfying the threshold of the Act. Congress has recently reemphasized this position:

> "This term [liability insurance] also includes homebuilders and sellers warranty insurance, which came within the scope of the Risk Retention Act's definition of product liability and similarly is intended to come within the definition of liability insurance contained in this bill. *See* S.Rept. 97-172, p. 8.

S.Rept. 99-294 at p. 9.

Faced with a clear congressional mandate, the Court of Appeals reluctantly concluded that the subject matter of HOWIC's insurance (*i.e.*, coverage for damage to the product—the home—itself) falls within the scope of the Act's definition of product liability. Slip Op. at 1117-18, App. at 66a-67a. Having established that the risk which is the subject of the insurance at issue is a "product liability risk" under the Act, Petitioners contend that further inquiry into the nature of the risk, for example, whether the homeowner 's right of recovery arises out of tort or contract or whether the policy provides an alternate source of recovery, is inappropriate. Certainly, a review of the Act itself and the legislative history thereof provides no basis for any inquiry into "alternate sources of recovery" or whether the right to recovery of the homeowner arises from contract, tort, or a combination thereof. To the contrary, the legislative history of the Act expresses an intent of Congress that the term "product liability risk" be given broad application so as to limit the prospect of litigation over that term and eliminate barriers to the formation of risk retention groups. In this regard, Representative James Florio, the House of Representatives' sponsor of the 1983 amendment, stated as follows:

> The National Association of Insurance Commissioners ("NAIC") has development [sic] a model State bill to assist States in implementing the Act. The model legislation is inconsistent with the Risk Retention Act in at least one crucial respect. The NAIC model State bill defines product liability as being determined by the laws of individual States.
>
> Thus, contrary to the uniform definition of product liability under the Risk Retention Act, under the model State bill, the definition of product liability will vary from State to State. For example, the definition of product liability in the Risk Retention Act allows risk retention groups to provide product liability coverage as defined in the Act, including

> coverage for damage or loss of use of property. House Report 97-190, at 9. This is so even if State definitions do not include damage to such property.
>
> If litigation were ever to arise on this point, the Federal definition of "product liability" would, of course, prevail in any construction of the scope of application of the Risk Retention Act. Nevertheless, the prospect of litigation itself would deter formation of risk retention groups and frustrate congressional intent. It therefore appears appropriate to clarify the law to remove any confusion which may have given rise to the inconsistent provision in the model State law.

129 Cong. Rec. H10431-32 (daily ed. Nov. 18, 1983) (Statement of Rep. Florio).

Furthermore, the Court of Appeals' instruction that the trial court determine whether the builder's liability, or the homeowner's right of recovery, arises from contract or tort law also is without support in the legislative history. Not only is there an absence of foundation for the Court of Appeals' position, but the only legislative history addressing the issue is in direct conflict with that position. Specifically, Congress, in its most recent review of the Product Liability Risk Retention Act, has made its intent clear. Congress is currently considering amending, once again, the Risk Retention Act to, *inter alia*, expand the coverage of the Act from not merely product liability risk but nearly all liability risk. *See* S.2129 (99th Congress). In this regard, the Senate Committee on Commerce, Science and Transportation, in reporting the bill out of committee, took occasion to comment on Congress' intent in passing the original Risk Retention Act. The Report, in explaining what the term "legal liability for damages" means for purposes of S.2129 (the Risk Retention Act uses the term "liability for damages"), stated that:

> The term "legal liability" as used in the definition of "liability insurance" includes liability that is

> assumed in a contract, agreement, or warranty that is an "insured contract" or liability that the insured would have in the absence of such a contract.

S. Rept. 99-294 at 9.

As Petitioners have noted, the Risk Retention Act of 1981, as amended in 1983, did not call for an examination of whether the risk involved was one arising out of contract or tort, but rather whether the risk was a product liability as defined by the Act. Congress' most recent comments concerning the Risk Retention Act make clear that distinctions between contract and tort liability are of no import. Similarly, there is nothing in the Congressional history or in the statute itself requiring an examination of the sources of recovery for the injured party.

The intent of Congress as expressed in the Risk Retention Act is clear. To the extent a group of manufacturers, such as builders, self insures liability for damages to the product itself (a home), the group is insuring a "product liability risk" under the Act. Because HOWIC, during years 3-10 of the 10 year insurance period, insures the builder/member against the cost of repairing or replacing major structural defects in the home, it must be concluded that the insurance covers "a portion of" a product liability risk under the Act.

It was the duty of the Eleventh Circuit to abide by that congressional intent concerning the nature of the risk at stake and not instruct the trial court to engage in other inquiries into the nature of the risk, which inquiries have the potential to frustrate the will of Congress. Accordingly, the Court of Appeals committed reversible error by adding to the criteria established by Congress the additional hurdles that the liability arise from tort rather than from contract law, and that the source of recovery for the injured not be an "alternate source" of recovery.

The purpose of the Risk Retention Act of 1981 was "to facilitate the ability of product producers to establish product liability risk retention groups, to facilitate the

ability of such sellers to purchase product liability insurance on a group basis and for other purposes." *See* Public Law 97-45 (95 Stat. 949). By imposing additional barriers to formation of risk retention groups, the Court of Appeals not only is frustrating Congress' stated purpose in promulgating the legislation, but also is creating a chilling effect for those groups which would be interested in forming risk retention groups under the statute.

It is well established that where congressional intent is discernible, courts must give effect to that intent and not substitute their own views for those of Congress. Thus, this Court, in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962), *overruled on other grounds, Boys Markets, Inc. v. Retail Clerks' Union, Local 770*, 398 U.S. 23 (1970), stated that:

> The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands. In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where Congressional intent is discernable . . . we must give effect to that intent. (Footnote omitted).

See also, Anderson v. Wilson, 289 U.S. 20, 27 (1933) ("We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it."); *State of Israel v. Motor Vessel Nili*, 435 F.2d 242 (5th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

Put another way, courts are not at liberty to add or deviate from words in a statute and thus thrust the Court's will upon the Congress where it is not necessary

to avoid an absurdity or frustrate the meaning or purpose of the statute. *Arkansas Valley Industries, Inc. v. Freeman*, 415 F.2d 713 (8th Cir. 1969). In this regard, if Congress, in response to manufacturers' difficulties in securing product liability insurance, intentionally and unambiguously drafted a particularly broad definition of a term in a remedial statute, as in the instant case the definition of "product liability risk," it is not the function of the reviewing court to narrow that definition and thus subvert the efforts of Congress. *Consumer's Union of U.S. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978).

What makes the Court of Appeals' error even more glaring, is the importance of the Risk Retention Act given the insurance liability crisis that has plagued the country over the past six years. That crisis, which was the Act's genesis, has become more pronounced. Thus, the Senate Commerce Committee has recently stated:

> Today, in 1986, the liability insurance crisis is more widespread and cuts across many lines of liability insurance. Rate making is not the only concern; unavailability of coverage is a major problem along with the high cost of insurance. At the present time, some manufacturers, service industries, municipal governments, hazardous waste disposers, day-care providers, commercial fishing vessel operators, restaurant and tavern owners, resort operators, corporate directors and officers, nurse-midwives, physicians, architects, and other professionals find themselves facing huge premium increases for liability insurance. Some have had their coverage cancelled or have faced reduced coverage with increased deductibles. Others cannot obtain liability coverage at any price.
>
> The scope and extent of the liability insurance crisis has been well documented before the Committee. In a number of subcommittee hearings, testimony has been presented about the impact of the tightening liability insurance market on such industries as

trucking, fishing and commercial satellite development.

* * * *

The Committee's view of the current liability insurance crisis is supported by the administration's Tort Policy Working Group in its recent report on insurance availability and affordability. As the report states:

> Liability insurance is a linchpin in the operation of the U.S. economy, yet many American businesses, professionals and municipalities, both large and small are encountering serious insurance problems arising from premium increases, policy cancellations, and refusals to underwrite certain activities.
>
> * * * *
>
> Where insurance is available (and in some areas it simply is not), premium increases of several hundred percent over the last year or two have become commonplace. Few, if any, private or public entities that rely on liability insurance have escaped the problems generated by this crisis.

S. Rept. 99-294 at pp. 4-5.

It is obvious from the foregoing, that the insurance crisis which Congress sought to address in passing the Risk Retention Act is just as severe, if not more severe, today than it was back in 1981 when the legislation was enacted. Petitioners assert that proper interpretation and application of the Risk Retention Act presents "an important question of federal law" to this Court warranting the grant of Petitioners' Petition for Writ of Certiorari. It would only be by reversal of the Court of Appeals' decision, that the additional qualifying criteria sought to be added unilaterally by that court would be removed and along with them the barriers and chilling effect to formation such criteria create.

CONCLUSION

Petitioners assert that the Congress of the United States should be free to adopt remedial legislation, subject only to constitutional proscriptions. It is upon the Congress, as the elected representatives of the people, that the burden of promulgating legislation to respond to the country's needs is placed. One such need was insurance coverage for the ever-increasing product liability exposure of the nation's manufacturers.

Congress, in the Risk Retention Act carefully considered this need and, to give effect to the Act's interstate scope, purposely adopted a broad definition of product liability. The Eleventh Circuit's decision, to the extent it seeks to narrow the scope of the Act is, therefore, an unwarranted intrusion by that court into a legislative function. In view of the nature of the legislation at issue, we respectfully submit that this case presents an important federal question on a statute which has not yet been addressed by this Court. Petitioners, therefore, respectfully request this Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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